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No. _____

In the Supreme Court of the United States

GEFFREY WAXMAN AND GAIL WAXMAN, AS PARENT AND NATURAL GUARDIAN OF RICHARD WAXMAN, A MINOR AND RICHARD WAXMAN,
Petitioners,

v.

ROSLYN UNION FREE SCHOOL DISTRICT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS, ALBANY

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Decisions of the Courts of the State of New York, with reference to the federal question involved herein, conflict with the Decision of this Court in *Honig v. Doe*, 484 U.S. 305 (1988).

LIST OF PARTIES

Petitioner

The petitioners, Geffrey Waxman and Gail Waxman, as Parents and Natural Guardians of Richard Waxman, a Minor, and Richard Waxman, have no corporate affiliations.

Respondent

The respondent is the Roslyn Union Free School District.

TABLE OF CONTENTS

Page

Question Presented i

List of Parties ii

Table of Contents iii

Table of Cited Authorities v

Opinions Below 1

Jurisdiction 1

Statutory Provision Involved 2

Statement of the Case 2

A. Relevant Facts 2

B. Proceedings Below 11

Reason for Granting the Writ 15

The Decisions of the Courts of the State of New York, with reference to the federal question involved herein, conflict with the Decision of this Court in *Honig v. Doe*, 484 U.S. 305 (1988) 15

Conclusion 23

Appendix

Appendix A
The Order of the New York State Court of Appeals dated December 12, 2002 . . . . . 1a

Appendix B
The Decision and Order on Motion of the Appellate Division of the Supreme Court of the State of New York, Second Department, entered September 18, 2002 . . . . . 2a

Appendix C
The Decision and Order of the Appellate Division of the Supreme Court of the State of New York, Second Department, dated April 22, 2002 . . . . . 4a

Appendix D
The Memorandum Decision and Order of the Honorable Marvin E. Segal, Supreme Court Justice, entered January 16, 2001 . . . . . 7a

TABLE OF CITED AUTHORITIES

Cases: **Page**

Clinton County R-III School District v. C.J.K.
896 F.Supp. 948, 949 (W.D. Mo, 1995) 19

Cronin v. Bd. of Education of East Ramapo Central School District
689 F.Supp. 197, 200-201 (SDNY 1988) . . 15-17

East Islip Union Free School District v. Anderson
161 Misc2d 945 12

Hacienda La Puente School District of Los Angeles v. Honig
976 F.2d 487 (9th Cir. 1992) 21

Honig v. Doe
484 US 305 (1988) . . . . . *passim*

King v. Pine Plains Central School District
918 F.Supp. 772, 776 (SDNY 1996) 15

Light v. Parkway C-2 School District
41 F.3d 1223 (8th Cir. 1994) 22

M.P. by D.P. v. Governing Board of the Grossmont Union High School District
858 F.Supp. 1044 (S.D. Cal. 1994) 20

Vander Malle v. Ambach
673 F.2d 49, 52 (2d Cir. 1982) 17

Statutes:

20 U.S.C. § 1400 . . . . . 2, 22

20 U.S.C. § 1415 (b) (1) (2) 16

20 U.S.C. § 1415 (c) 16

20 U.S.C. § 1415 (e) (2) 16

20 U.S.C. § 1415 (e) (3) 16

20 U.S.C. § 1415 (j) 2

Petitioners respectfully petition for a writ of certiorari to review the Decisions of the Courts of the State of New York, with reference to the federal question involved herein.

OPINIONS BELOW

The Decisions and Orders of the Courts of the State of New York are unreported and are reproduced in the Appendix.

JURISDICTION

The Memorandum Decision and Order of the Supreme Court, State of New York (Segal, J.) is dated January 16, 2001. The Decision and Order of the Appellate Division of the Supreme Court of the State of New York, Second Department, which affirmed the Memorandum Decision and Order of the Supreme Court, State of New York is dated January 22, 2002.

Petitioners, by Notice of Motion dated May 22, 2002, moved, pursuant to the New York Civil Practice Law and Rules, before the Appellate Division of the Supreme Court of the State of New York, Second Department, for leave to appeal to the New York State Court of Appeals. By Decision and Order on Motion entered September 18, 2002, the Appellate Division of the Supreme Court of the State of New York, Second Department, denied petitioners' motion. Thereupon, on October 3, 2002, petitioners sought leave to appeal from the New York State Court of Appeals. On December 12, 2002, the New York State Court of Appeals dismissed petitioners' motion to appeal. No rehearing was requested.

STATUTORY PROVISIONS INVOLVED

The statutory provision involved is the Individuals with Disabilities Education Act, (IDEA), 20 U.S.C. §1400 et seq.. 20 U.S.C. §1415(j) states:

"(j) Maintenance of current educational placement

> Except as provided in subsection (k)(7) of this section, during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed."

STATEMENT OF THE CASE

A. Relevant Facts

Petitioner Richard Waxman entered Respondent District as a fifth grade student at the East Hills Elementary School in November, 1999. Richard and his parents, Geffrey and Gail Waxman, had moved into the District from the Scarsdale, New York District. In March, 2000, the Principal of the elementary school sought an evaluation, through Respondent's Committee on Special Education (CSE), to determine whether Richard was disabled and ought to be classified under relevant state and federal statute. In April, 2000, Richard's parents, believing that the attempted referral

was inappropriate, exercised their right and objected to the referral and evaluation.

Pursuant to regulation, upon the parents' unwillingness to consent to the evaluation, Respondent implemented an administrative procedure to have a Hearing Officer determine if the evaluation should be conducted without the parents' consent. This matter had not yet been heard before a Hearing Officer when the 1999-2000 school year ended. Richard's parents felt that an evaluation for Special Education was inappropriate because in prior academic and psychological testing Richard scored well above average academically and psychologically. Furthermore, his report card grades were at or above grade level and there is no medical evidence that Richard has a disability of any kind.

In September, 2000, Richard entered the sixth grade at the Roslyn Middle School. On October 27, 2000, Richard was suspended from school for two (2) days by the Principal of the Middle School. On November 15, 2000, Richard was suspended for an additional five (5) days or from November 16-28, 2000. The alleged reasons justifying these suspensions, which Petitioners categorically disputed, are contained in the Memorandum Decision and Order of the Supreme Court, State of New York, (Segal, J.). Both of the above suspensions were appealed to Commissioner Richard Mills of the State of New York. In two (2) separate decisions, Commissioner Mills annulled and expunged the suspensions from Richard's record. Also, on November 15, 2000, petitioner Geffrey Waxman filed a police report concerning the second suspension, where school personnel assaulted and chased Richard, a ten year old asthmatic, out of the school building.

At all times, Richard has been found to be highly intelligent and has always achieved good academic grades in school.

While Richard was suspended between November 16-28, 2000 and in retaliation for petitioner Geffrey Waxman having filed the police report, Respondent commenced a judicial proceeding in the Nassau County Supreme Court seeking preliminary injunctive relief enjoining Richard from attending school and suspending him from regular instruction. In support thereof, Respondent alleged that Richard was believed to have a disability and that he had exhibited behavioral problems which warranted his being suspended from regular instruction and barred from the Roslyn Middle School.

Petitioners vehemently contested Respondent's application and a hearing was held before the Supreme Court of the State of New York (Segal, J.) on January 3-4, 2001. It was as a result of this hearing that Justice Segal issued his Memorandum Decision and Order entered January 16, 2001.

At the hearing, Ronald Cohen, a Psychologist, testified on Petitioners' behalf. He noted that Richard would do best in a school setting "where he was able to maximize his interactions with other children in terms of helping to normalize his social skills. Dr. Cohen further noted that he did not believe that Richard was a danger to himself or others. Respondent did not present its own expert to rebut Dr. Cohen.[1]

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[1] Dr. Cohen wrote a letter in February, 2001, stating that Richard's behavior had improved and how important it was for Richard to socialize in a regular school setting.

According to Mr. Palmadesso, the School Principal, most of the incidents involving Richard were minor. However, he cited three alleged incidents which he contended were more major and which formed the basis of Respondent's application for injunctive relief. The first involved the so-called fire drill incident. The second involved an incident where Richard was allegedly "throwing himself against the steel doors of the school." The third involved allegations that Richard improperly sought to obtain chocolate milk from a vending machine in the cafeteria and, when assaulted, ran onto the school grounds. These incidents, it is Petitioners' belief, were not sufficient to impose the drastic action that the New York State Courts ultimately took against Richard.

For example, with reference to the fire drill incident, Perri Peters, Richard's Social Studies Teacher, testified. She stated "Two children had caught Richard coming out of the opposite door and he almost got hit by a car, and they pulled him back in the nick of time and pulled him over to me and I talked with him." During the hearing, the following exchange occurred between Ms. Peters and counsel: "Now did you actually see with your own eyes whether Richard got hit by a car?" Answer: "No, I did not." This, Petitioners assert, constituted a major contradiction in testimony.

Robin Milgrim, Richard's CORE Teacher, testified to the same event. "Almost immediately when we got there, Richard was running down the sidewalk and was running down into the traffic circle and there were no other students or adults aside from the other teacher or I yet, and he came running out and proceeded to run right across the traffic circle, and a parent who was either dropping someone off or picking up, came pretty close, a foot or so, I would say, maybe a little more, but not very far from hitting him, and the other teacher and I, because he was sort of coming from that

other direction, as Ms. Peters said, as soon as we saw him we told him to stop but he kept on running, and the car had to slam on its brakes ...."

One or both of these accounts was a complete fabrication of the truth. If the car was picking up or dropping off a student, why was the car permitted onto school grounds during a fire drill and how could the car be in motion if it was discharging or picking up a passenger? If Ms. Peters' account is correct, there would be students outside saving Richard. If Ms. Milgrim's account was correct, no students were outside and the only witnesses were herself and an unnamed teacher. If neither were correct, Richard did nothing wrong that day.

The same result must follow with reference to the incident whereby Richard allegedly ran out of the building and then banged his head against the wall. Geffrey Waxman rebutted this allegation. This testimony reveals that Richard did not leave the building for no reason.

"Q. And did you discuss with either Mr. Palmadesso or Mr. Greco the IWC and what role that played in the suspension?

A. Yes, according to my son, he said that's normally when you go to the IWC, you walk out through the breezeway to get there, and I thought, you know, that he ran out of the building. I wanted to know, was he running out of the building or was he actually going to the IWC?

Q. Did you discuss that with him?

A. Yes, Mr. Greco showed me how most people go to the IWC and it is through the breezeway. He showed me the IWC is on the other side of the doors. I think there is a picture of the breezeway where I can show you. [indicating] As you can see, the principals' office doors are on this side of the breezeway, IWC are on the other side. There are actually four doors, only one of them are opened, and according to my son, he chose the one that wasn't open. He banged his head and then he fell back and he laughed about, but the door was not opened."

Very simply, Richard did not run away on this occasion and did not display any dangerous behavior. He did not run outside the building, but went to the IWC as he was told by Mr. Palmadesso and Mr. Greco, the Guidance Counsellor.

The record also reveals that the third and climatic incident, which concerned Richard attempting to obtain chocolate milk and then being interfered with by the teacher's aides also occurred under mitigating circumstances. Richard, a known asthmatic, attempting to quench his thirst after playing outside, tried to buy a can of chocolate milk from a vending machine. He had the can crushed in his hand by one aide while being accosted from behind by another aide. Richard was then chased out of the building and nearly onto the Long Island Expressway service road. Respondent attempted to justify its severe reaction to this matter by claiming that Richard had entered the service road of the Long

Island Expressway, adjacent to the school. Therefore, Respondent, opined, Richard is an unacceptable risk.

Rather than supporting Respondent's position, the preponderance of the evidence revealed that Richard did not actually enter the service road and, in fact, never left the school grounds. Even the suspension letter, signed by Mr. Palmadesso and written with the help of the Roslyn School District's attorneys, indicated that Richard "ran off school grounds at or near the Long Island Expressway service road." It is impossible to be both. Either Richard was on or Richard was near the service road. If Mr. Palmadesso was the person who was at the scene, why did he write these words in his letter of suspension? Why did Mr. Palmadesso need a lawyer to instruct him to write on or near when he knew where Richard was? Did it have to do with petitioners filing a police report about the incident and the School District needing an excuse for obtaining an injunction barring Richard from school? On cross-examination, the following exchange occurred between Mr. Palmadesso and counsel:

> "Q. You see where it says that Richard was suspended from school for 'running off school grounds at or near the Long Island Expressway service road?
>
> A. Right.
>
> Q. Is there a reason you wrote near, instead of on –
>
> A. It says on, and also I consulted with the district's attorneys and this is the letter, this is how they asked me to phrase the letter."

Both Richard Waxman and Geffrey Waxman also categorically denied that Richard had run onto the service road.

The record also revealed that it was Respondent's conduct that precipitated this incident in the first place. All Richard was seeking to do was obtain a drink because he was thirsty. It was the school aides who escalated the situation by crushing the can of chocolate milk in his hand by one teacher's aide while the other aide grabbed Richard from behind. On cross-examination, the following exchange occurred between Mr. Ingegno and counsel:

> "Q. OK. Now could you describe the way that you and Mr. Lobelia took the can away from Richard?
>
> A. When I walked in Mr. Lobelia had the can. He was holding Richie's hand and the can. They were all one at that point. I said, I'll pull his hands and he was fighting to let it go. It was a two second thing, once I came in I grabbed his hands. We got the can away, of course, Richie had opened it. We saw him try to open it and some of the stuff spilled out.
>
> Q. Did the can get crushed at any point?
>
> A. I don't remember, the think it might have, but I can't say positively.
>
> Q. Did it get crushed while it was in Richard's hand?

A. I can't say if it did or it didn't. I do know it was closed when I got there and then it was open and I did see him try to pop the top off.

Q. At any point in time did you grab Richard from behind?

A. No, all I did was, I might have gone behind him to separate his hands but I never grabbed him.

Q. There was a point in time when you were actually physically around him, had your arms around him and his body to grab the can in front of you?

A. Yes, I guess so.

Q. Did you ever bring your arms underneath his hands?

A. No, I pulled him apart.

Q. Do you know what a full Nelson is?

A. Yes, it's this (indicating).

Q. Did you ever do that?

A. No, no."

By restraining him and by crushing the can in his presence, Richard became extremely alarmed. Even Mr. Palmadesso, the Principal, conceded that he knew that the

school aides had tried to physically take the can from Richard. Moreover, the aides themselves conceded that they utilized physical force on Richard. This incident precipitated Richard, who was ten years old at the time, to run away from school personnel in fear for his safety.

B. Proceedings Below

It was as a result of this hearing that the Supreme Court of the State of New York (Segal, J.) issued a Memorandum Decision and Order dated January 16, 2001.

In the Memorandum Decision and Order, Justice Segal held:

> "Pursuant to 20 USC 1415(j) and Education Law 4404(4)(a), a student shall remain in the student's then current educational placement until the completion of proceedings pursuant to said statutes to determine whether or not the student is disabled within the meaning of the statutes. Accordingly, during the pendency of proceedings under said statutes, a school district may not unilaterally change a student's placement from classroom instruction to homebound schooling even where that student poses a danger to himself or others (*Honig v. Doe*, 484 US 305). A school district may, however, obtain court ordered injunctive relief, pursuant to 20 USC 1415(e)(2), authorizing the district to extend the suspension upon proof that maintaining the student in the current placement is substantially likely to result in injury to the student or others (*see*, *Honig v. Doe*, supra;

East Islip Union Free School District v. Anderson, 161 Misc2d 945)."

Justice Segal then held that Respondent had met this burden and, therefore, concluded:

> "... a preliminary injunction is granted continuing Richard's suspension and enjoining his attendance in school until such time as the referral seeking testing has been denied or until the testing has been completed and reviewed by the CSE."

Clearly, the basis of Justice Segal's Memorandum Decision and Order were the two (2) suspensions that Richard had received. In his Memorandum Decision and Order, Justice Segal acknowledged that he was acting to "extend" the suspensions.

The Court, in considering this motion, cannot ignore developments which occurred subsequent to Justice Segal's Memorandum Decision and Order. On March 28, 2001, Richard P. Mills, Commissioner on Education of the State of New York, sustained Petitioners' appeal of both suspensions. The Commissioner, in separate decisions, ordered that Richard's suspensions be annulled and expunged from his record.

Since Justice Segal's Memorandum Decision and Order, Richard continued in psychotherapy with Ronald I. Cohen, Psy.D., once to twice per week. In a letter dated February 11, 2001, after Justice Segal rendered his Memorandum Decision and Order, Dr. Cohen noted that Richard has been making "steady progress" in terms of the factors enumerated in the letter.

Richard has also been seeing Elliot Goldman, Ph.D., a licensed Psychologist at Schneider Children's Hospital. Dr. Goldman has seen Richard several times. Dr. Goldman noted the deleterious effect Richard's isolation from the school population is having on him. Dr. Goldman stated that Richard "would greatly benefit from a return to a regular school schedule." Furthermore, at the request of Richard's parents, Dr. Goldman conducted a full battery of psychological testing. Richard, again, scored academically well above his grade level and Dr. Goldman found Richard had no thought or psychological disorders and that Richard was not a danger to himself or others. Furthermore, before making this finding, Petitioners discussed the concerns, allegations and anecdotal records that the School District maintained with Dr. Goldman. Petitioners gave the School District a copy of Dr. Goldman's report, which included his recommendation that Richard be returned to a regular education setting. Petitioners offered the School District the opportunity to meet with Dr. Goldman, but it refused.

On or about March 23, 2001, Respondent served a Complaint upon Petitioners seeking to permanently enjoin Richard's attendance.

Meanwhile, on July 12, 2001, the State Review Officer affirmed Respondent's position that Richard be evaluated. To date, Richard remains barred from attending school. Believing that this decision was grossly erroneous, both on the facts and the law, Petitioners duly filed a Notice of Appeal to the Appellate Division of the Supreme Court of the State of New York Second Department.

In a Decision and Order dated April 22, 2002, the Appellate Division of the Supreme Court of the State of New York, Second Department, affirmed the Memorandum

Decision and Order of the Supreme Court of the State of New York. In doing so, the Appellate Division, held:

> "The evidence submitted by the respondent, Roslyn Union Free School District, clearly demonstrated that permitting the infant appellant to return to regular classroom instruction is substantially likely to result in injury to himself or to others. The undisputed evidence most notably reveals that he has run out of classrooms, as well as the school building, dangerously close to the Long Island Expressway, without permission, chased other students in the classroom, hit teachers and students with either a folder or crumpled paper, and chewed on sharp objects while leaning back in his chair. Accordingly, the Supreme Court properly granted a preliminary injunction extending the suspension from school of the infant appellant and placing him on homebound instruction pending the completion of a psychiatric evaluation and a review by the School District's Committee on Special Education."

Petitioners then sought review by the New York State Court of Appeals. Petitioners, by Notice of Motion dated May 22, 2002, moved, pursuant to the New York Civil Practice Law and Rules, before the Appellate Division of the Supreme Court of the State of New York, Second Department, for leave to appeal to the New York State Court of Appeals. By Decision and Order on Motion entered September 18, 2002, the Appellate Division of the Supreme Court of the State of New York, Second Department, denied petitioners' motion. Thereupon, on October 3, 2002,

petitioners sought leave to appeal from the New York State Court of Appeals. On December 12, 2002, the New York State Court of Appeals dismissed petitioners' motion to appeal. No rehearing was requested.

This petition for writ of certiorari follows because the New York State Courts decided an important question of federal law in a way that conflicts with a relevant decision of this Court, to wit: *Honig v. Doe*, supra.

REASONS FOR GRANTING THE WRIT

1. The Decisions of the Courts of the State of New York, with reference to the federal question involved herein, conflict with the Decision of this Court in *Honig v. Doe*, 484 U.S. 305 (1988)

Petitioners respectfully submit that the Decisions of the Courts of the State of New York, with reference to the federal question involved herein, conflict with the Decision of this Court in *Honig v. Doe*, 484 U.S. 305 (1988).

The relevant statutes involved herein are the Individual's with Disabilities Education Act ("IDEA"), 20 USC §1400, et seq., and the related New York statute, Education Law §4404. These statutes ensure that all children with disabilities have available to them a free appropriate public education. These statutes also ensure that the rights of handicapped children and their parents are protected. See, e.g., *King v. Pine Plains Central School District*, 918 F.Supp. 772, 776 (SDNY 1996); *Cronin v. Bd. of Education of East Ramapo Central School District*, 689 F.Supp. 197, 200-201 (SDNY 1988).

Because Congress envisioned a significant parental role, both the federal and state statutes establish a variety of procedural protection that ensure parents have an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of decisions with which they disagree. *Honig v. Doe*, supra. at 598; *Cronin*, supra. at 200.

These procedural safeguards include:

> "[T]he right to examine all relevant records with respect to the identification, evaluation, and educational placement of their handicapped child, prior written notice when an educational agency either initiates or refuses to initiate a change in the child's placement, and an opportunity to have an impartial due process hearing with respect to any complaints parents might have concerning their child's education. 20 U.S.C. §1415(b)(1), (2). The Act also provides that, at the conclusion of the impartial hearing, the aggrieved party can seek further administrative review and, if unsuccessful, can ultimately appeal by filing a civil action in any state or federal court. 20 U.S.C. §1415(c), (e)(2)." *Id.* at 200-201.

Crucial to ensuring that the rights of both children and parents are protected, by both the federal and state statutes, is the so-called "stay-put" provision. This provision governs the placement of the child while review proceedings are pending. Unless the parent and school district agree otherwise, the child shall remain in his then current educational placement. 20 U.S.C. §1415 (e)(3), New York Education Law §4404(4).

The stay-put provision recognizes that:

> "danger of excluding a handicapped child entitled to an educational placement from that placement was much greater than the harm of allowing a child not entitled to an educational placement to remain in that placement during the pendency of judicial proceedings. Thus, the statute provides that all handicapped children, regardless of whether their case is meritorious or not, are to remain in their current placement until the dispute with regard to their placement is ultimately resolved." *Cronin* at 202.

Courts have found that expulsion of a handicapped student constitutes a "change in placement" under the relevant Acts. *Cronin* at 202.

This Court in *Honig v. Doe* has described the stay-put provision as a "clear directive" and has stated that the language is "unequivocal." *Id.* at 323. The Supreme Court continued that a violation of the stay-put provision is presumptive evidence of irreparable harm. This provision has been further referred to as a "status quo" provision. *Vander Malle v. Ambach*, 673 F.2d 49, 52 (2d Cir. 1982)

In *Honig v. Doe*, this Court refused to read a dangerousness exception into the stay-put provision and declined to give school district officials the authority to remove dangerous or violent children from school during the pendency of administrative proceedings.

This Court, however, in *Honig v. Doe*, authorized a very narrow judicial exception to the stay-put provision,

where a school district can establish that the current placement is "substantially likely to result in injury either to [the handicapped child] or to others. *Id.* at 328. The court recognized that there is a presumption in any such action "in favor of the child's current educational placement." *Id.* In doing so, the Supreme Court stated "Nor do we think that §1415(e)(3) operates to limit the equitable powers of district courts such that they cannot, **in appropriate cases, temporarily enjoin** a dangerous disabled child from attending school." *Id.* at 327 (emphasis added). This is the basis upon which the New York Courts purported to act herein.

However, Petitioners respectfully assert that the New York Courts distorted this Court's rationale in *Honig v. Doe* and its very narrow judicial exception and gave itself wide authority, which this Court in *Honig* had refused to give school districts and never intended to give to courts. The New York Courts herein interpreted the exception carved out in *Honig v. Doe* much too broadly. Very simply, despite the offering of a series of incidents involving Richard, there was simply no indication that Richard's placement in school "is substantially likely to result in injury either to himself or to others."

Clearly, the three "major incidents" forming the basis of Respondent's application were not sufficient to result in the drastic action taken by the New York Courts and do not properly show that Richard is a substantial threat to himself or others. Moreover, the New York Courts misapplied this Court's ruling in *Honig v. Doe* by imposing the injunction pending the completion of testing, a justification not permitted by *Honig v. Doe* and one which chills the parents' right to contest the need for testing. As such, the New York Courts' conclusions herein are, with reference to the IDEA, in conflict with the decision of this Court in *Honig v. Doe*.

This Court, in *Honig v. Doe*, and thereafter, did not attempt to offer guidelines for the application of its narrow exception to the stay-put provision. *Clinton County R-III School District v. C.J.K.*, 896 F.Supp. 948, 949 (W.D. Mo, 1995). This Court should, therefore, utilize the within matter to offer guidelines for the application of its narrow exception to the stay-put provision, which apparently it has never done.

In fact, a review of case law reveals a paucity of judicial decisions involving a district's application to invoke the *Honig* exception and have a court grant injunctive relief against a student's continued attendance. Because of the paucity of case law, we must review decisions from other states to see how they have interpreted the statute and *Honig v. Doe*. However, one thing is clear, the allegations against Richard do not rise to the level that can justify the drastic action undertaken against him.

The court in *Clinton Co.*, supra., attempted to offer its interpretation of what must be required for a court to intervene. There, the court was confronted with a school district's application for "short-term" relief, where it alleged that the student had made repeated threats to school officials and students, including threatening a teacher to make her "black and blue"; and threatening to place an explosive device in the principal's car. The school district also alleged that the student had violently thrown furniture and other objects, including one situation where another student was injured. The district contended that the student was totally out of control and that the teachers were afraid of him.

The court in *Clinton Co.* then noted "No reported ruling by a court has a recitation of facts in which a school district even claimed to avoid the stay-put provision when the

physical dangers were limited as proven in this case." *Id.* at 951. The court then held:

> "Property damage is apparently not enough to authorize relief. Disruption of the educational process apparently does not open the door for early relief. While the danger of personal injury is undefined, it seems that it must be of a distinctly significant nature, going well beyond what may be typical for even behaviorally disturbed students, before **extraordinary relief** is merited. Danger must not only be likely (very possible), but must be 'substantially' likely. The Supreme Court's language is not unlike that of a statutory test for the involuntary commitment of persons."(emphasis added)

This Court should express a similar interpretation. There was absolutely no evidence in the record that Richard ever actually injured anyone; that he ever displayed any weapons; that there was an imminent and real danger of violence or that his behavior went "well beyond what may be typical for even behaviorally disturbed students" in order to justify the extraordinary relief that the lower court imposed.

A similar result was reached in *M.P. by D.P. v. Governing Board of the Grossmont Union High School District*, 858 F.Supp. 1044 (S.D. Cal. 1994). There, the school district alleged that a student who had received 16 referrals for discipline, including fighting, insubordination and disruptive behavior, had been most recently found in possession of a pellet gun on school property. The school district attempted to obtain injunctive relief barring the student's attendance on the ground of dangerousness. The

court refused to grant relief holding that "In the present case, although the bringing of a gun to school could result in violence, the [student] did not attempt to use the gun nor did he show the gun off and create the possibility of an accidental shooting." *Id.* at 1050.

In reaching this decision, the court in that case, also considered *Honig v. Doe*. The court, in *M.P. by D.P.*, supra., noted, unlike the lower court herein, that the New York Courts herein, that this Court in *Honig v. Doe*, despite recognizing a narrow exception to the stay-put provision, **actually held that expulsion was not appropriate** in that particular case. This Court had so held, despite the violent nature of the student's action in that case and the advanced age of the student. The student in *Honig v. Doe* had choked a fellow student with sufficient force to leave abrasions on the child's neck and had also kicked out a school window.

There can be no doubt that the fact pattern in *Honig v. Doe*, upon which the New York Courts so heavily relied, was much more egregious than the fact pattern at bar. Although recognizing that there are some circumstances under which a court may intervene, this Court recognized that its own fact pattern did not present such a case. It is, therefore, inexplicable and highly ironic that the New York Courts could have utilized *Honig v. Doe* and its very narrow exception to justify Richard's expulsion, when this Court itself refused to expel the violent student in the very case in which it carved out the exception.

The Ninth Circuit in *Hacienda La Puente School District of Los Angeles v. Honig*, 976 F.2d 487 (9th Cir. 1992) is also instructive. There, the court refused to intervene to expel a student with a long history of academic and emotional problems who had frightened a second student

with a stolen starter pistol. *Id.* at 489. Despite the presence of the starter pistol, the Ninth Circuit held at that expulsion was inappropriate.

Another court, *Light v. Parkway C-2 School District*, 41 F.3d 1223 (8th Cir. 1994), has even gone further in interpreting *Honig v. Doe*. Not only must the school district meet the heavy burden as discussed hereinbefore, but it must also "show that it has made reasonable efforts to accommodate the child's disabilities so as to minimize the likelihood that the child will injure himself or others." *Id.* at 1228. The court noted that "School district's should not seek to remove disabled children until reasonable steps have been taken to mitigate the threat of injury." *Id.* at 1228. This, said the court, is required by 20 U.S.C. §1400, et seq.. The court then held "Before exercising its equitable authority to remove a disabled child from any placement, a district court should be satisfied that the school district has made reasonable use of 'supplementary aids and services' to control the child's propensity to inflict injury." *Id.* No such showing was ever made by Respondent in the case at bar.

Under all of the circumstances present herein, it is respectfully submitted that the record that the New York Courts were not justified in applying the narrow exception enumerated in *Honig v. Doe*. Since there is a paucity of case law involving this issue and since no guidelines or parameters have been set by this Court after *Honig v. Doe*, this petition should be granted so that the Court may reconcile the conflict between the New York Courts' decisions and the prior decision of this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twelfth day of December 2002

Present, Hon. Judith S. Kaye, Chief Judge, presiding.

2-10 Mo. No. 1106	)
Roslyn Union Free School District,	)
Respondent,	)
v.	)
	)
Geffrey W. (Anonymous), et al.,	)
Appellants.	)
	)

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution.

/s/ _____
Stuart M. Cohen
Clerk of the Court

APPENDIX B

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

[Filed September 18, 2002]

1194m
A/sl

MYRIAM J. ALTMAN, J.P.
LEO F. McGINITY
SANDRA L. TOWNES
STEPHEN G. CRANE, JJ.

2001-02556)
)
Roslyn Union Free School District,)
Respondent,)
v.)
)
Geffrey W. (Anonymous), et al.,)
Appellants.)
)
(Index No. 18399/00))
)

DECISION & ORDER ON MOTION

Motion by the appellants for leave to appeal to the Court of Appeals from a decision and order of this court, dated April 22, 2002, which determined an appeal from an

order of the Supreme Court, Nassau County, entered January 16, 2001.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied.

ALTMAN, J.P., McGINITY, TOWNES and CRANE, J.J., concur.

ENTER:

James Edward Pelzer
Clerk

APPENDIX C

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

[Filed April 22, 2002]

9623B
C/jv
Argued - March 22, 2002

_____AD2d_____
MYRIAM J. ALTMAN, J.P.
LEO F. McGINITY
SANDRA L. TOWNES
STEPHEN G. CRANE, JJ.

2001-02556

Roslyn Union Free School District,
Respondent,
v.

Geffrey W. (Anonymous), et al.,
Appellants.

Wolin & Wolin, Jericho, N.Y. (Alan E. Wolin of counsel), for appellants.

Jaspan Schlesinger Hoffman, LLP, Garden City, N.Y. (Stanley A. Camhi and Scott Fisher of counsel), for respondent.

DECISION & ORDER

In an action, inter alia, to permanently enjoin the infant defendant from regular instruction at the Roslyn Middle School and to place him on homebound instruction, the defendants appeal from an order of the Supreme Court, Nassau County (Segal, J.), entered January 16, 2001, which, after a hearing, granted the plaintiff's motion for a preliminary injunction extending the suspension from school of the infant defendant and placing him on homebound instruction pending the completion of a psychiatric evaluation and a review by the Committee on Special Education of the plaintiff Roslyn Union Free School District.

ORDERED that the order is affirmed, with costs.

Pursuant to 20 USC § 1415 (j) and Education Law § 4404 (4) (a), a student shall remain in his then-current educational placement during the pendency of any proceedings regarding whether he is disabled as contemplated by these statutes. As such, even where a student poses a danger to himself or others, a school district may not unilaterally change the student's placement from regular instruction to homebound instruction while such proceedings are pending (*see Honig v Doe*, 484 US 305, 327-328). However, a school district is entitled to seek injunctive relief, pursuant to 20 USC § 1415 (k) (2) (A), authorizing it to extend a student's suspension upon a showing that maintaining the student in his current placement is substantially likely to result in injury to himself or to others (*see Honig v Doe, supra; East Islip Union Free School Dist. v Andersen*, 161 Misc 2d 945, 948).

The evidence submitted by the plaintiff, Roslyn Union Free School District, clearly demonstrated that permitting the infant defendant to return to regular classroom instruction is

substantially likely to result in injury to himself or to others. The undisputed evidence most notably reveals that he has run out of classrooms, as well as the school building, dangerously close to the Long Island Expressway, without permission, chased other students in the classroom, hit teachers and students with either a folder or crumpled paper, and chewed on sharp objects while leaning back in his chair. Accordingly, the Supreme Court properly granted a preliminary injunction extending the suspension from school of the infant defendant and placing him on homebound instruction pending the completion of a psychiatric evaluation and a review by the School District's Committee on Special Education.

Altman, J.P., McGinity, Townes and Crane, JJ., concur.

ENTER:

James Edward Pelzer
Clerk

APPENDIX D

SUPREME COURT, NASSAU COUNTY

PART 5

BY: MARVIN E. SEGAL

DATED: JANUARY 5, 2001

INDEX NO. 018399/00

MOTION DATE 1/4/01
MOTION #1

ROSLYN UNION FREE SCHOOL DISTRICT,
Plaintiff(s)

-against-

GEFFREY WAXMAN and GAIL WAXMAN, as Parent and Natural Guardian of RICHARD WAXMAN, a Minor and RICHARD WAXMAN,
Defendant(s)

MEMO DECISION AND ORDER

This is an action commenced pursuant to 20 USC 1400, et seq. and Education Law 4401 et seq. wherein the plaintiff school district seeks a permanent injunction enjoining

Richard Waxman, an eleven year old student in the sixth grade at Roslyn Middle School, from attending school, and suspending him from regular instruction and placing him in homebound instruction. By Order to Show Cause dated November 21, 2000, the plaintiff moved for preliminary injunctive relief pursuant to CPLR § 6301 pending the completion of a psychiatric/psychological evaluation of the child and a review of the evaluation by the school district's Committee on Special Education (CSE).

Pursuant to a "so ordered" written stipulation executed by the parties, the application for a preliminary injunction was adjourned to afford Richard and his parents the opportunity to evaluate a temporary alternative educational program for Richard administered by the Educational Assistance Corporation in Port Washington. This program was not deemed satisfactory by Richard's parents. The application for a preliminary injunction was set down for a hearing which commenced on January 3, 2001 and concluded on January 4, 2001. The plaintiff called seven witnesses to wit: Ms. Peters, Richard's social studies teacher; Ms. Milgrim, Richard's core subjects teacher; Ms. Mancia, Richard's home and career skills teacher; Ms. Arcarola, Richard's science teacher; Ms. Murphy, a teaching assistant; Mr. Ingegno, a teaching assistant, Mr. Palmadesso, principal of the Roslyn Middle School; and Ms. McGovern, an administrator whose duties include the administration of the Individuals with Disabilities Act (IDEA), 20 USC 1400 et seq.

Richard Cohen, PhD., a licensed psychologist; Richard Waxman, and Richard's father, Geffrey Waxman

testified in opposition to the application for a preliminary injunction.

At the conclusion of the hearing, the court reserved decision. Based upon the testimony adduced at the trial and the exhibits received in evidence, the court makes the following findings of fact and conclusions of law:

Richard Waxman (Richard) entered the Roslyn School District as a fifth grade student in the East Hills Elementary School in November, 1999. He previously was a student in the Scarsdale School District. On or about March 15, 2000, the principal of the elementary school, Mr. Kaplan made a referral to the CSE seeking an evaluation to determine whether or not Richard had a disability which warranted his classification as a student with disabilities pursuant to 20 USC 1400 et seq. By letter dated April 12, 2000, Richard's parents objected to the referral and to any testing. Pursuant to 300 NYCRR 200.5, upon the parents' refusal to consent to a initial evaluation, the board of education of the school district must commence a formal hearing seeking authority to conduct an evaluation of the child without the parents' consent. The informal hearing was recently completed and a decision by the Hearing Officer is expected in about one month.

On October 27, 2000, Richard was suspended from school for two days by Mr. Palmadesso, principal of the Middle School. Richard did not return to school until on or about November 14, 2000. On November 15, 2000, Richard was suspended by Mr. Palmadesso, for five days. On November 21, 2000, the plaintiff obtained a temporary restraining order extending Richard's suspension. Plaintiff

now seeks a preliminary injunction continuing the period of suspension.

Pursuant to 20 USC 1415 (j) and Education Law 4404 (4) (a), a student shall remain in the student's then current educational placement until the completion of proceedings pursuant to said statutes to determine whether or not the student is disabled within the meaning of the statutes. Accordingly, during the pendency of proceedings under said statutes, a school district may not unilaterally change a student's placement from classroom instruction to homebound schooling even where that student poses a danger to himself or others (*Honig v. Doe*, 484 US 305). A school district may, however, obtain court ordered injunctive relief, pursuant to 20 USC 1415 (e) (2), authorizing the district to extend the suspension upon proof that maintaining the student in the current placement is substantially likely to result in injury to the student or others (*see, Honig v. Doe*, supra, *East Islip Union Free School District v. Anderson*, 161 Misc2d 945).

The Court finds that the plaintiff has met this burden.

Ronald Cohen, PhD., the psychologist who testified on behalf of Richard and his parents, testified that Richard's social and emotional maturation was significantly regressed. He diagnosed Richard as suffering from an oppositional, defiant disorder, and testified that Richard's parents have great difficulty controlling Richard's behavior. He found that Richard's parents are unable to get Richard to respect and go along with the parents' boundaries and rule making. Dr. Cohen testified unequivocally that in his opinion, Richard's parents should consent to the testing requested by the school

district so that Richard could get services he requires. Dr. Cohen testified that the social interaction of a school setting would benefit Richard and that he should be returned to school under the "right psychological and social conditions". Dr. Cohen stated that he had asked Richard's parents to provide him with information concerning Richard, which they refused to give him; and he conceded that they brought Richard to see him, commencing on October 18, 2000, for the purpose of having him testify.

The testimony elicited from the various school personnel demonstrated that, like Richard's parents, the teachers, teachers assistants, assistant principal and principal of Richard's school are unable to get Richard to respect boundaries and comply with rules, and that Richard's continued placement in classroom instruction is substantially likely to result in injury to Richard and others.

According to the testimony of Ms. Peters and Ms. Milgrim, on one occasion, after hearing an emergency bell, Richard disregarded all rules concerning lining up with his class and exiting the building in an orderly fashion. Instead, Richard ran out of the classroom, out of the building, and into a traffic circle by the school entrance. A car in the traffic circle jammed on its brakes, stopping only a foot from Richard.

According to the testimony of Mr. Palmadesso and Mr. Ingegno during the ninth period on October 27, 2000, Richard was found outside the front of the school building, running around and swinging around the concrete poles between the breezeway and the driveway. When they

attempted to persuade him to go inside the building, Richard ran into a glass and metal door several times, slamming his body against the door and banging his head. It took more than five minutes to get Richard back inside the building.

Mr. Palmadesso and Mr. Ingegno and Richard himself testified that on November 15, 2000 Richard exited the cafeteria and ran into the school field. He ran the perimeter of the school yard, first toward Norther State Parkway, then North on Locust Lane, crossing two driveways utilized by cars and buses approaching and leaving the school. He continued to run toward the service road of the Long Island Expressway. Mr. Palmadesso and Mr. Ingegno testified that Richard exited school grounds through the "walker gate" and actually stepped onto the service road where Mr. Palmadesso grabbed him from the path of an on-coming truck. Richard denies that he left school grounds and denies that he stepped into the service road. The inconsistency of the testimony on this issue is not dispositive. During this incident, Richard admittedly led the school principal, assistant principal, a school assistant, and the head custodian on a chase through the perimeter of the school grounds through woods and across two driveways, until the chase ended either on or near the service road of the Long Island Expressway. It is unquestionable that there is a substantial likelihood of injury to an eleven year old student who leaves the school building without permission and supervision.

Richard's teachers and the teachers assistants testified to incidents in which Richard chased other students around the kitchen area of his home skills class, the science lab, and a crowded cafeteria. He chased another student with a pencil in

his hand. The teachers described incidents during which Richard placed various objects in his mouth including pen caps, pen shards, wads of paper, and masking tape picked up off the floor. Richard threw wads of wet papers towels at other students and on two occasions spit at other students.

Ms. Milgrim testified that Richard banged himself on the head repeatedly with a 2 liter plastic soda bottle, and then threw a book in her direction. Ms. Mancia testified that he hit her and other students in the head with a soft paper folder. Ms. Arcarola testified that Richard intentionally rolled his wheeled book bag into the legs of other students, and that he repeatedly hit himself on the head with a plastic ruler. Ms. Mancia testified that Richard blocked the doorway of her classroom and prevented her from getting back into the room. Ms. Murphy testified that Richard blocked the door and pried her fingers off the knob when she tried to open the door.

Richard's behavior has not yet resulted in a significant physical injury to himself, another student, or a teacher. However, Mr. Palmadesso testified that Richard's behavior has become progressively out of control. The psychologist who testified on behalf of the defendants did not provide the court with any indication that Richard's ability to respect boundaries and comply with rules in the classroom had or would soon improve. Further, Richard's father testified that Richard is "fast"; that he can "bolt pretty quickly" and that if her were to run, an adult would have trouble catching him. It is clear that even under constant observation, Richard is likely to run out of the school building, put objects in his mouth, throw objects at others, chase and hit others. Accordingly, the court finds that Richard's continued placement in classroom

instruction is substantially likely to result in injury to Richard and or others.

There was testimony at trial by Ms. McGovern that if the Hearing Officer recommends that Richard undergo psychiatric and or psychological testing and his parents choose to appeal that determination, the exhaustion of all avenues of appeal could last beyond a year. Nevertheless, a preliminary injunction is granted continuing Richard's suspension and enjoining his attendance in school until such time as the referral seeking testing has been denied or until the testing has been completed and reviewed by the CSE.

This constitutes the decision and Order of the Court. The action is calendared for a status telephone conference on February 15, 2001 at 10:00 a.m. The plaintiff's counsel shall initiate sassistant conference. The telephone status conferences shall continue on the third Thursday of each month at 10:00 a.m. until the proceedings before the CSE are concluded.

January 8, 2001 /s/ _____
J.S.C.

Entered Jan. 16, 2001
Nassau County
County Clerk's Office

Supreme Court, U.S.
FILED
APR 10 2003
CLERK

No. 02-1333

In the

Supreme Court of the United States

GEFFREY WAXMAN and GAIL WAXMAN, as Parent and Natural Guardian of Richard Waxman, a Minor, and RICHARD WAXMAN,

Petitioners,

v.

ROSLYN UNION FREE SCHOOL DISTRICT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

WHETHER A COURT'S TEMPORARY REMOVAL OF A STUDENT WITH A SUSPECTED DISABILITY FROM HIS THEN CURRENT SCHOOL PLACEMENT, AFTER FINDING THAT MAINTAINING THE STUDENT IN THAT PLACEMENT IS SUBSTANTIALLY LIKELY TO RESULT IN INJURY TO HIMSELF OR OTHERS, IS CONSISTENT WITH THIS COURT'S HOLDING IN *HONIG v. DOE*.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

JURISDICTION 1

STATUTORY PROVISION 1

COUNTER-STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 10

CONCLUSION 17

APPENDIX

STATUTORY PROVISIONS AND RULES 1a

TABLE OF AUTHORITIES

CASES

HONIG V. DOE, 484 U.S. 305 (1988)..... *passim*

LIGHT V. PARKWAY C-2 SCHOOL DISTRICT, 41 F.3d 1223 (8TH CIR. 1994)..... 15

UNITED STATES V. JOHNSTON, 268 U.S. 220 (1925)..... 14

STATUTES AND REGULATIONS

20 U.S.C. §1400 *et. seq.*..... 2

20 U.S.C. §1415(e)(2)..... 13

20 U.S.C. §1415(e)(3)..... 12, 13

20 U.S.C. §1415(i)(2)..... 13

20 U.S.C. §1415(j)..... *passim*

20 U.S.C. §1415(k)(8)(A)..... 11

28 U.S.C. §1257..... 1

28 U.S.C. §1257(a)..... 10

N.Y. Educ. Law §3214..... 6

8 N.Y.C.R.R. § 200.5(b)(1)(i)(c)..... 3

JURISDICTION

This Court lacks jurisdiction to entertain this matter. 28 U.S.C. §1257 provides in relevant part that this Court may review by writ of certiorari "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." The instant petition seeks review of an interlocutory order.

STATUTORY PROVISION

Individuals with Disabilities Education Act, 20 U.S.C. §1415(j)

> **Maintenance of current educational placement.** Except as provided in subsection (k)(7), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

COUNTER-STATEMENT OF THE CASE

On November 21, 2000, respondent, the Roslyn Union Free School District ("District"), commenced an action in the New York State Supreme Court, for an order enjoining Richard Waxman's continued attendance at the

District's Middle School due to certain exhibited behaviors which raised safety concerns for both Richard and others at the school. Although Richard's parents had refused to allow the District to evaluate him, the District had reason to believe that Richard was a youngster with a disability within the meaning of the federal Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §1400 *et. seq.* As a result, it was required to obtain a court order to remove Richard from the classroom and place him on homebound instruction. The court conducted an evidentiary hearing with respect to the District's motion for a preliminary injunction. On January 8, 2001, the trial court granted the motion finding that Richard's continued placement in the classroom was substantially likely to result in injury to himself or to others.

Factual Background

At the time of the preliminary injunction hearing in January 2001, Richard was ten years old. Richard moved into the District in the Fall of the 1999-2000 school year and enrolled in the fifth grade at the District's East Hills Elementary School. According to school personnel, Richard started exhibiting behavioral problems shortly after he arrived in the District. Some of the behaviors included threatening to kill staff, refusing to comply with school rules and staff instructions, poking at his eyes with pencils, putting plastic wrap in his mouth, sliding off his chair onto the floor, screaming out, speaking incessantly, and mimicking staff. As a result of his behavioral problems, on March 15, 2000, the principal of the elementary school referred Richard to the District's Committee on Special Education ("CSE") for a determination as to whether he had a disability and should be classified as such. Classification would have entitled Richard to a special education program and related

services. Richard's parents objected to the referral. The CSE convened on May 23, 2000. It determined that in view of Richard's maladjustment to school and his disruptive and aggressive behavior, a psychiatric and psychological evaluation was necessary to evaluate whether Richard had a disability which was adversely affecting his education and his ability to function appropriately in a regular education setting. His parents refused to participate in the CSE process and refused to grant permission for the District to conduct the necessary evaluations.

New York State Education Department regulations provide in relevant part that in the event parents refuse to grant consent to an initial evaluation, the board of education of the school district shall initiate a formal impartial hearing to determine whether an evaluation should be conducted without parental consent. *See*, 8 N.Y.C.R.R. §200.5(b)(1)(i)(c). Due to the serious nature of Richard's behaviors, the District initiated the impartial hearing. The hearing commenced on August 1, 2000 and continued into the 2000-2001 school year. While the hearing was ongoing, Richard continued to attend regular classes in the District. In September 2000, Richard entered the sixth grade at the District's Middle School.

Virtually from the day Richard began attending the Middle School, he engaged in inappropriate behaviors which required intervention by District staff almost on a daily basis. Some of his behavior was quite bizarre. For example, he would call out or laugh for no apparent reason. He would throw paper and eat paper in class. He would curse at teachers and students. He would chant and hum in class. He would mock and mimic teachers. He would refuse to sit down in class. He would make spit bubbles, stick out his tongue, and hide under his desk. On one occasion he got down on the floor and started

motioning as if he was swimming.

During October and November 2000, Richard's behavior problems escalated and he exhibited behaviors which were more and more dangerous to himself, to other students and to the school's administrators, faculty and staff. For example, several times Richard chased other students. He spit at students, threw "spit balls", and spit milk at them. On one occasion Richard spit in another student's ear. He attempted to trip students with his book bag. He threw things at other students. Once he threw his book bag at a teacher. Another time he threw a pen cap at a student. He hit students on their heads with a folder. Once he tried to hit a student with a pencil case. Another time he tried to jab a student with a pencil.

His inappropriate and dangerous behavior was also directed at teachers and support staff. On one occasion, Richard barred his teacher from entering the classroom by barricading the door while he and other students were inside. On other occasions he pushed teachers and once grabbed the hand of a teaching assistant and bent back her fingers.

Richard's behavior was also self-destructive and dangerous. On one occasion he started spinning in his seat, fell on the floor, and then started spinning on the floor. Another time he locked and barricaded himself in the school's detention room. He often put wads of paper in his mouth. Once he was seen chewing on a sharp plastic shard. He had to be stopped from banging a ruler on his head. He ignored instructions during a fire drill, running out of the building and almost being hit by a car. Several times Richard left his classroom without permission, sometimes even leaving the building.

On October 27, 2000, Richard was suspended by the principal of the Middle School for two days because of an incident in front of the school building in which Richard was running and swinging around concrete poles. When the principal attempted to get Richard to return to the building, Richard ran into a glass and metal door several times, slamming his body and head against the door. Although the suspension was for two days, Richard did not return to school until November 14, 2000.

On November 15, 2000, an incident occurred which jeopardized Richard's life as well as the safety of District personnel. After lunch, Richard was required to go to his next class. Instead, he returned to the school's cafeteria to use a vending machine. Richard knew that the machine was "off limits" until after school and was told that he would have to wait until then if he wanted something from the machine. He objected and started running around the cafeteria crawling under and around the tables. Finally, he maneuvered himself to the vending machine. When District personnel tried to confiscate the item he had purchased, Richard ran out of the building and into the school yard. He ignored repeated requests to stop and return to the building. Instead, Richard kept running across the field and around the school grounds. Eventually he came to a gate and ran off the school property and onto the adjacent service road of the Long Island Expressway, a major highway, at the same spot where a student had been killed a few years earlier. When the Middle School principal finally caught up with Richard, Richard picked up a rock as if he was going to throw it. When Richard ran onto the service road, the principal grabbed him, pulled him off the road and brought him back into the school to await the arrival of his parents.

As a result of this dangerous behavior, the principal suspended Richard from school for five days. Although Richard's behavior as a non-classified student would have warranted a Superintendent's hearing pursuant to N.Y. Education Law §3214 to determine whether any additional penalty for his conduct should be imposed, special rules apply with respect to the suspension of students who are disabled within the meaning of the IDEA and the State Education Law. With limited exceptions, a school district may not suspend a student with a disability from regular attendance from school in excess of ten days, since such an extended suspension is considered a change in placement which is prohibited by the IDEA. 20 U.S.C. §1415(j). Notwithstanding this "stay put" provision, a school district may apply to a court for injunctive relief to enjoin a dangerous disabled child from attending school in accordance with this Court's holding in *Honig v. Doe*, 484 U.S. 305 (1988).

Because of Richard's serious, repeated, dangerous, and threatening behavior, the District sought an order from the New York State Supreme Court excluding Richard from regular instruction in school pending an evaluation and determination of whether he was a youngster with a disability within the meaning of the IDEA and, if so, the development of an appropriate individualized educational plan ("IEP") in accordance with the IDEA.

The Preliminary Injunction Hearing

The court conducted an evidentiary hearing on January 3, 2001 and January 4, 2001 to ascertain whether there was sufficient evidence that Richard was a danger to himself or to others to warrant the issuance of a preliminary injunction enjoining his attendance at school.

The District produced eight witnesses at the hearing, including four of Richard's teachers, two teaching assistants, the Middle School principal and the Assistant Superintendent for Pupil Services and Personnel. The teachers, teaching assistants and principal all provided eyewitness accounts of Richard's dangerous behavior. Two of his teachers testified that Richard ignored instructions during a fire drill, bolted out of the classroom and out of the building, ran onto the roadway by the entrance to the school and just missed being hit by a car. Another teacher testified how Richard picked masking tape off the floor and ate it. Another testified how Richard locked her out of her classroom and refused to open the door. Another teacher testified that Richard threw a book bag at her. Another teacher testified how Richard chased a student with a pencil in his hand. Another testified how Richard repeatedly banged himself on his head with a plastic bottle. One of the teaching assistants described how he saw Richard repeatedly slam his body against a glass and metal door. Another teaching assistant testified how Richard pried her fingers off a door knob when she tried to open a door that he was blocking. The principal testified how Richard ran out onto the service road of the Long Island Expressway after leading school officials on a chase along the perimeter of school grounds, through woods and across two driveways.

Richard and his parents were represented by counsel at the hearing and had the opportunity to cross-examine the District's witnesses. They also had the opportunity to present witnesses on their own behalf including Richard's psychologist, Dr. Ronald Cohen. He confirmed that Richard had difficulty respecting boundaries and complying with rules in the classroom. In addition, Dr. Cohen testified that, in his opinion, Richard required psychological help and that it would be in his

best interest if an assessment was done. Richard's father testified that if Richard wanted to run away from school, an adult would have a hard time catching him. Richard, himself, testified regarding the events. He admitted that he ran out of the building and around the school grounds and that he picked up a rock, although he denied that he intended to throw the rock and denied that he actually ran onto the road.

Finally, the Assistant Superintendent for Pupil Services and Personnel testified regarding the then current status of the impartial hearing the District had commenced to determine whether an evaluation should be conducted without parental consent. At the time of the preliminary injunction hearing, the Impartial Hearing Officer ("IHO") had not yet rendered a decision in the administrative proceeding. She also testified about the District's attempts to address Richard's behaviors in school as well as the home-based services the District would provide so that Richard could keep up with his studies.

On January 8, 2001, the trial court issued a Decision and Order. It concluded that the District had met its burden and granted a preliminary injunction enjoining Richard's attendance in school "until such time as the referral seeking testing has been denied or until the testing has been completed and reviewed by the CSE."[1]

---

[1]On February 2, 2001, after a full evidentiary hearing, the IHO rendered his decision. He found that a sufficient basis existed for Richard to be evaluated by the District without his parents' consent. Richard's parents appealed the IHO's decision to the State Education Department. The State Review Officer ("SRO") agreed with the IHO's decision. Despite the decision, Richard's parents still would not allow him to be evaluated.

Petitioners appealed to the Appellate Division of the New York Supreme Court, Second Department. On April 22, 2002, the Appellate Division, affirmed the trial court's order granting a preliminary injunction finding that the District had "clearly demonstrated that permitting the infant defendant to return to regular classroom instruction is substantially likely to result in injury to himself or to others."

Petitioners' motion for leave to appeal to the New York Court of Appeals was denied.

Despite the decisions and orders of the trial court, the Appellate Division, the IHO and SRO, Richard's parents have not allowed him to be evaluated. Without a proper evaluation the District cannot determine what special services, if any, Richard needs and what the appropriate educational placement is for him consistent with those needs. Instead, they commenced a federal action against the District in the Eastern District of New York alleging, *inter alia*, that Richard's rights under the IDEA have been violated. *Waxman v. Roslyn Union Free School District*, (CV-01-7445) (E.D.N.Y.). That action is pending. Until such time as an IEP can be developed which enables the District to properly address Richard's needs, his continued presence in the regular classroom setting is substantially likely to result in injury to himself and/or to others.[2]

---

[2]On November 2, 2002, respondent moved by Order to Show Cause in the New York State Supreme Court for an order directing Richard's parents to submit him for the evaluation authorized by the IHO and affirmed by the SRO. Petitioners opposed the application. Although noting that "at every stage of the judicial and administrative process [Richard's parents] have thwarted the [District's] efforts to comply with its mandate under the [IDEA] and New York Education Law," the Court nevertheless denied the application because of

REASONS FOR DENYING THE WRIT

I. THE ORDER WHICH PETITIONERS SEEK TO REVIEW IS AN INTERLOCUTORY ORDER

The petition seeks a writ of certiorari to the New York Court of Appeals to review a Decision and Order of the Appellate Division of the Supreme Court, Second Department, affirming an order of the trial court, granting a preliminary injunction in favor of respondent. The New York Court of Appeals denied petitioners' motion for leave to appeal to that court. 28 U.S.C. §1257(a) provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the constitution, treaties or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the constitution or the treaties or statutes of, or any commission held or authority exercised under the United States.

The decision which petitioners seek to review is not a final judgment or decree. As a result, this Court lacks jurisdiction to review the order by writ of certiorari.

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petitioners' pending action in the federal district court.

II. THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S HOLDING IN *HONIG V. DOE*

This case contains no novel issues, nor does it present an important question of federal law which has not already been settled by this Court. Indeed, the state court's decision which petitioners seek to review relies upon and is consistent with this Court's holding in *Honig v. Doe*, 484 U.S. 305 (1988) which established an exception to the "stay put" provisions of the IDEA. Under the IDEA, if a school district has reason to believe that a child is disabled within the meaning of the statute, the child is entitled to all procedural protections afforded by the Act. 20 U.S.C. §1415(k)(8)(A). The IDEA provides that a disabled student is entitled to remain in his then current educational placement while any proceedings under the Act are conducted. 20 U.S.C. §1415(j). This is the so-called "stay-put" provision of the IDEA. Since the District had reason to believe that Richard was a youngster with a disability and had initiated "proceedings" under the IDEA to have him evaluated, the "stay-put" provision of IDEA governed Richard's educational placement.

Although pursuant to the IDEA a school district may not unilaterally remove a disabled student from his then current educational placement while review proceedings are pending, it is not without a remedy in appropriate cases. Upon application from a school district, a court, under certain circumstances, may remove a child from his then current placement despite the "stay put" provision.

This authority was confirmed in *Honig v. Doe*, *supra*. In *Honig*, this Court reviewed the history and purpose of the Education of the Handicapped Act ("EHA")

(the precursor to the IDEA) with regard to suspension or expulsion of students with disabilities and noted that while:

> Congress very much meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school. In so doing, Congress did not leave school administrators powerless to deal with dangerous students . . .

Honig, 484 U.S. at 323 (emphasis in original). This Court recognized that, although Congress intended that a school district's unilateral authority to change a student's placement be circumscribed, the statute did not affect the equitable power of a court to change a student's placement when maintaining the child in his then current placement was substantially likely to result in injury either to himself or to others. In this regard the Court stated:

> Nor do we think that § 1415(e)(3) [3] operates to limit the equitable power of district courts such that they cannot, in appropriate cases, temporarily enjoin a dangerous disabled child from attending school. As the EHA's legislative history makes clear, one of the evils Congress sought to remedy was the unilateral exclusion of disabled children by *schools*,

---

[3] 20 U.S.C. §1415(e)(3) was renumbered and recodified with minor modifications as 20 U.S.C. §1415(j) by the Individuals with Disabilities Education Act Amendments of 1997.

> not courts, and one of the purposes of § 1415(e)(3), therefore, was "to prevent *school* officials from removing a child from the regular public school classroom over the parents' objection pending completion of the review proceedings." *Burlington School Committee v. Massachusetts Dept. of Education*, 471 U.S., at 373, 105 S. Ct., at 2004 (emphasis added). The stay-put provision in no way purports to limit or pre-empt the authority conferred on courts by § 1415(e)(2) [4], see *Doe v. Brookline School Committee*, 722 F.2d 910, 917 (CA1 1983); indeed, it says nothing whatever about judicial power.
>
> In short, then, we believe that school officials are entitled to seek injunctive relief under § 1415(e)(2) in appropriate cases. In any such action, § 1415(e)(3) effectively creates a presumption in favor of the child's current educational placement which school officials can overcome only by showing that maintaining the child in his or her current placement is substantially likely to result in injury either to himself or herself, or to others.

Id., 484 U.S. at 327-28. The "substantially likely to result in injury" test has been routinely applied by courts since the *Honig* decision.

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[4] 20 U.S.C. §1415(e)(2) was renumbered and recodified with minor modifications as 20 U.S.C. §1415(i)(2).

The rule established in *Honig* was the only reasonable interpretation of the statute. It recognizes that the health and safety of the child at issue as well as the health and safety of others in the school must be protected, and establishes a fair and impartial mechanism to make certain that a school district does not remove a disabled child from the school setting simply because the student is unruly or difficult. Petitioners acknowledge the District's right to obtain injunctive relief from a court where a disabled student's then current placement is substantially likely to result in injury either to himself or others.

Petitioners' real complaint is that they disagree with the factual findings made by the trial court. They rely upon snippets of testimony or alleged inconsistencies in an attempt to undermine the court's decision. Their "spin" on the facts, however, is at odds with the overwhelming evidence introduced at the hearing. Petitioners also fail to note that their own psychologist, Dr. Cohen, testified that Richard required "psychological help" and that if there was an assessment done "it would be in the child's best interest." He also conceded that, based on the evidence presented by the District, Richard had placed himself in a "potentially life threatening situation."

Petitioners' disagreement with the trial court's factual findings is not a sufficient reason for granting the petition. *United States v. Johnston*, 268 U.S. 220, 227 (1925) (certiorari is not granted to review evidence and discuss specific facts). The trial judge, of course, was in the best position to assess the evidence and the credibility of the witnesses who testified. The record developed at the hearing supported the court's finding that continuing Richard in his then current placement was substantially likely to result in injury to himself or to others.

None of the lower court cases cited by petitioners in support of their argument that the New York courts misapplied this Court's rule in *Honig* are germane since each case is fact sensitive. The state court, based upon the facts presented, properly granted the temporary injunction pending the completion of testing. There is no doubt that Richard has severe behavioral problems. The District has repeatedly attempted to have him evaluated so that it could develop an appropriate IEP to address those problems. Without an appropriate program in place specifically designed to address and deal with his dangerous behaviors, returning Richard to the classroom would pose substantial risks to himself and to others.

Petitioners' reliance upon *Light v. Parkway C-2 School District*, 41 F.3d 1223 (8th Cir. 1994) is misplaced for several reasons. The child in *Light* had been classified as disabled. Petitioners, here, continue to assert that Richard is *not* disabled and, therefore, not in need of any special services. In addition, *Honig* does not impose an additional burden on a school district to demonstrate its efforts to accommodate the child's disabilities as a condition for relief. Nevertheless, the District did demonstrate its efforts to address Richard's behaviors at the hearing. The Assistant Superintendent for Pupil Services testified that a team consisting of Richard's teachers was brought together to discuss and implement various "behavior strategies" to deal with Richard's behavioral issues, but that the strategies were unsuccessful. The District also commenced the impartial hearing so that it could evaluate Richard, even without his parents' consent, and develop an appropriate IEP for him.

Finally, petitioners make reference to the fact that the Commissioner of Education expunged the two suspensions imposed by the school principal. The

Commissioner's decision in this regard is irrelevant to the issues presented on this petition. It was based on the District's technical non-compliance with a regulation which required Richard's parents to *receive* written notice of the suspension within twenty-four hours. ' The Commissioner did not rule or comment upon the underlying factual matters which formed the basis for the suspensions. Specifically, he did not find that the behaviors exhibited by Richard did not create a danger to himself or to others. Moreover, he did not comment on the court's power to remove Richard from his then current placement or the appropriateness of the court's action.

In sum, there is no substantial question of law which needs to be addressed by this Court. *Honig* clearly affirmed a court's equitable power to grant, in appropriate cases, a temporary injunction enjoining a dangerous child from attending school notwithstanding the IDEA's "stay put" provision. The decision of the state court, issued after a full evidentiary hearing, was fully consistent with rule established in *Honig*.

CONCLUSION

For all of the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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APPENDIX

STATUTORY PROVISIONS AND RULES

20 U.S.C. §1415(k)(8)(A)

In general. A child who has not been determined to be eligible for special education and related services under this part [20 USCS §§1411 et seq.] and who has engaged in behavior that violated any rule or code of conduct of the local educational agency, including any behavior described in paragraph (1), may assert any of the protections provided for in this part [20 USCS §§1411 et seq.] if the local educational agency had knowledge (as determined in accordance with this paragraph) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

20 U.S.C. §1415(j)

Maintenance of current educational placement. Except as provided in subsection (k)(7), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

8 N.Y.C.R.R. §200.5(b)(1)(i)(c)

In the event the parent of the student to be evaluated does not grant consent for an initial evaluation, such parent shall be informed by the committee chairperson that, upon request, the parent will be given an opportunity to attend an informal conference with the committee or designated professionals most familiar with the proposed evaluation, the person who referred the student for such an evaluation, and counsel or an advisor of the parent's choice, at which time the parent shall be afforded an opportunity to ask questions regarding the proposed evaluation. If at this meeting the parent and the person initiating the referral agree in writing that the referral is not warranted, the referral shall be withdrawn. Except in the case of a preschool child, if the parent does not request or attend such a conference, or continues to withhold consent for evaluation otherwise required for a period of 30 days after the date of receipt of a referral, the board of education shall initiate an impartial hearing to be conducted in accordance with subdivision (i) of this section for the purpose of determining whether such an evaluation shall be conducted without parental consent.

Supreme Court, U.S.
FILED
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(3)

No. 02-1333

In the
Supreme Court of the United States

GEFFREY WAXMAN AND GAIL WAXMAN, AS PARENT AND NATURAL GUARDIAN OF RICHARD WAXMAN, A MINOR AND RICHARD WAXMAN,
Petitioners,

v.

ROSLYN UNION FREE SCHOOL DISTRICT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS, ALBANY

PETITIONERS' REPLY BRIEF

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10 pp

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. THE COURT HAS JURISDICTION TO ENTERTAIN THIS MATTER 1

II. RESPONDENT'S FACTUAL BACKGROUND IS INCORRECT 2

CONCLUSION 7

TABLE OF AUTHORITIES

Cases:

Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza Inc., 391 U.S. 308 (1968) 1

Gotthilf v. Sills, 375 U.S. 79 (1963) 2

Honig v. Doe, 484 U.S. 305 (1988) 6

Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) 1

Statutes:

28 U.S.C. §1257 1

I

THE COURT HAS JURISDICTION TO ENTERTAIN THIS MATTER

In its Brief in Opposition to the Petition for Writ of Certiorari, Respondent asserts that this Court lacks jurisdiction, under 28 U.S.C. §1257, to entertain this matter. Petitioners respectfully disagree.

This Court, in the past, has reviewed injunctions under the circumstances herein presented. For example, in *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), the Court held that it had power to decide a case, which had been labeled "temporary" by the State courts. In doing so, the Court noted that there was no indication that the temporary injunction rested on disputed questions of fact which might be resolved differently upon further hearing. The Court continued that the issuance of a permanent injunction, under those circumstances, would be little more than a formality.

The same rationale applies herein. The New York court granted a temporary injunction after an evidentiary hearing. As a result of the evidentiary hearing, the New York court made findings of fact. It cannot be expected that the New York court would, in any way, alter its determination upon further proceedings.

This Court held similarly in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza Inc.*, 391 U.S. 308 (1968). In that case, this Court agreed to review the matter where a State court order, as herein, granted an injunction and provided that it would remain in effect until further modification. This Court held that the injunction

would be deemed final because there was no indication that any modification would be forthcoming at any time in the near future.

Again, this rationale applies herein. There are no current proceedings pending in the New York courts with reference to any request to make the injunction "permanent." There is also no likelihood that the New York court will alter its decision at any time in the near future. In fact, Richard has now been suspended from school since November 15, 2000. This should constitute permanency.

It should also be noted that, although the New York Court of Appeals dismissed the Motion for Leave to Appeal, the Appellate Division of the New York State Supreme Court denied the prior application for leave to appeal to the New York Court of Appeals. This factor is also important in determining whether the State Court's order was final. *See, Gotthilf v. Sills*, 375 U.S. 79 (1963).

Petitioners, therefore, respectfully request that, contrary to Respondent's claim, this Court consider the matter to be a final judgment of the New York State courts and accept jurisdiction to review this Petition.

II

RESPONDENT'S FACTUAL BACKGROUND IS INCORRECT

Petitioners hereby rebut Respondent's recitation of the factual background of this case. In order to submit a student to Special Education, the student must have a classified disability which significantly affects his/her learning. The facts herein prove otherwise.

Three (3) different psychologists and one (1) psychiatrist opined that Richard has no disability. Respondent offered no expert witness to support its belief. Respondent is in possession of all these reports, which show that Richard scored highly academically and psychologically and has no disabilities that would classify him for Special Education. They also show that Richard is a youngster that would benefit from the socialization that school offers.

Every teacher rated Richard academically satisfactory or above. This is in the official testimony of his teachers at both the impartial hearing and the evidentiary hearing. It is also evident in his report cards. Richard has been recommended for Honors classes in High School in most of his subjects, including Honors Math, Honors Science, Honors History and Honors English.

There is no classification in Special Education for discipline problems. The legislature has not funded Special Education programs for students with disciplinary problems.

Five days prior to the Impartial Hearing, petitioners, pursuant to IDEA law, requested, through their lawyer, copies of all evidence that Respondent intended to use. The key evidence was a typewritten anecdotal written by Richard's fifth grade teacher. All of the Respondent's witnesses read testimony from this anecdotal and the Impartial Hearing Officer allowed them to use this anecdotal as the basis for the Special Education referral. Numerous times, petitioners' lawyer objected to this as improper, but the Impartial Hearing Officer overruled the objections. Approximately one (1) year later, petitioners were advised, in writing, that the original handwritten anecdotal was destroyed by Respondent. Respondent destroyed the original handwritten anecdotal prior to the hearing before the Impartial Hearing Officer. Instead,

Respondent manufactured a typewritten version and used this version as evidence against Richard. In fact, much of this version was untrue, but was accepted over Petitioners' objections.

It is not routine for any School District to enjoin a child. It has never been the case that a 10 year old child be enjoined from school because their parents objected to the School District's conducting psychological testing. Quite contrary, most School Districts accept expert opinions from a child's doctor.

It is not routine for Respondent to ban a child from school, strip him of his right to attend school and suspend him indefinitely. Richard has now been suspended from school since November 15, 2000. This should constitute permanency.

The testimony at the hearing supported Petitioners' claim that Richard is not a danger to himself or others. For example, Perri Peters, the History teacher, testified that Richard had not hurt himself or another to her knowledge. Robin Milgrim, another teacher, testified that Richard had never hit anyone to her knowledge. Liza Mancia, another teacher, testified similarly. She indicated that she had never observed Richard hit anyone in her class. Theresa Arcarola, the Science teacher, also testified that she never observed Richard hit anyone, never saw spit coming out of his mouth and never believed that Richard was trying to hurt himself. Mrs. Murphy, a teacher's aide, testified similarly.

Dr. Cohen testified that, in his opinion, Richard is not a danger to himself or others.

Mr. Ingegno, a Teaching Assistant, testified that the first time that Richard had detention was October 27, 2000, the date of the first suspension. In that suspension, Richard was accused of tapping students and teacher with a soft file folder. The school did not allow Richard's father to speak to the teacher involved. Richard was also accused of slamming into a glass door. If he slammed into a glass door, why did it not break? Why did Richard not hurt himself. He accidently chose a closed door, one of the four were open and Richard chose the wrong one. In any event, Commissioner Mills, the highest School Administrator in the State of New York, expunged the suspension from the record. Still, Respondent uses expunged records and submits them as fact. By law, expunged records must be stricken from the record and not used against Richard in any way.

Mr. Ingegno also testified that he grabbed Richard from behind and pulled his arms apart while another school aide, Mr. Lobelia, crushed the can in Richard's hand. In New York State Education Law, this is a form of corporal punishment that school personnel are not allowed to do. Being frightened by these individuals actions, Richard ran out onto school grounds. They then chased Richard and, when Richard stopped running, they forcefully grabbed and hurt him as they took him back to the school.

To cover-up their actions, after Richard's father called the Police, they made up a story that Richard was "on or near the Long Island Expressway service road." Mr. Palmadesso testified that Respondent's lawyers helped him draft the suspension letter. Why did Respondent need its lawyers to draft the letter of suspension? If Richard was "on" the service road, why didn't the suspension letter state that? The reason is that Richard was never "on" the service road. His own testimony indicates that he was on school grounds.

"Near" could be anywhere since the school is near the service road. Respondent needed some reason to seek the injunction. Richard was not on the Long Island Expressway service road, but they needed to say that to claim Richard was a danger to himself. It is clear from the facts, Richard was never on the Long Island Expressway service road, but instead he was inside school grounds.

Commissioner Mills expunged this suspension from the record, however, Respondent repeats its fictitious claims. By law, expunged records must be stricken from the record and not used against Richard in any way.

Richard never carried a weapon to school, hit anyone in school or used drugs or alcohol. It has never been established that Richard ever was or will be a substantial danger to himself or others. His only "transgression" was the fact that his parents exercised their due process rights and Respondent, through intimidation and vindictiveness, punished Richard. This is in direct violation of IDEA Law with respect to parents' rights. Richard has become the real victim. He is isolated from his friends, traumatized and stigmatized. The New York State Courts determinations compel Richard to stay at home and receive only ten (10) hours per week of tutoring. The Court can take official notice that there are many students throughout the Nation who are in school at the present time with records far more worse than Richard's. The Court must stop school districts' indiscriminately using injunctive relief to abridge due process laws of the IDEA. Richard simply did not fall within the narrow exception that this Court carved in *Honig v. Doe*, 484 U.S. 305 (1988).

Petitioners possess documents and doctor's reports substantiating their position. Upon this Court's review of this matter, petitioners will supply the Court with copies of these documents.

CONCLUSION

Therefore, it is respectfully requested that this Court reject any arguments advanced by Respondent and, instead, grant the requested Petition.

Respectfully submitted,

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